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IN THE

Supreme Court of the United States

October Term, 1956.

No. [redacted]63

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

On Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 668.

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

ON CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania and the order denying reargument are reported at 386 Pa. 82; 125 A. 2d 327, and are printed at R. 113 et seq. The Opinion of the Court of Common Pleas of Philadelphia County, the Opinions of the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, and the Order of the Board of Public Education are unreported and are printed at R. 76-104.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered June 25, 1956; the Order Denying Reargument was entered October 3, 1956. The Petition for Certiorari was filed December 28, 1956, within the ninety-day period allowed by 28 U. S. C. § 2101 (c). Certiorari was granted on May 20, 1957, 353 U. S. (Adv.) 964. The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The citations of the constitutional and statutory provisions involved are noted below. Their full text is printed as Appendix A.

Due Process Clause
U. S. C., Const. Amendment 14.

Statutory Remedies Act
Act of 1806, March 21, P. L. 558; 4 Sm. L. 13; 46 Purdon's Pa. Stats. Ann. § 156.

Teachers' Tenure Act
Act of 1949, March 10, P. L. 30, Art. XI, §§ 1122, 1123; 1949, May 9, P. L. 939, § 4; 24 Purdon's Pa. Stats. Ann. §§ 11-1122, 11-1123.

Pennsylvania Loyalty Act
Act of 1951, Dec. 22, P. L. 1726, §§ 3, 5, 6, 10, 15a; Purdon's Pa. Stats. Ann. §§ 213, 215, 216, 220, 225a.

QUESTION PRESENTED.

Is it a violation of the Due Process provision of the Fourteenth Amendment for a state to dismiss a public school teacher on the alleged ground of incompetency under the following circumstances:

(a) Where the only evidence of incompetency is the teacher's refusal in 1952 to answer a question asked by the District Superintendent of Schools about his membership in the Communist Political Association in 1944;

(b) Where the association which is the subject of the question, was entirely lawful for public employees at the time it was alleged to exist;

(c) Where the refusal to answer is made in good faith and upon advice of counsel that the law prohibits the questioning of teachers on their political beliefs;

(d) Where no statute, ordinance or regulation provides that such refusal to answer may be grounds for dismissal;

(e) Where the exclusive provisions of state law providing for investigation of and dismissal for subversive activity are ignored by the school authorities; and

(f) Where the dismissal proceedings, on the alleged ground of incompetency, are such as to make the character of the dismissal appear to be for disloyalty and the teacher is given no hearing on the issue of his loyalty.

STATEMENT OF THE CASE.

Petitioner was appointed a public school teacher in Philadelphia on February 17, 1930 (R. 16). For twenty-three years thereafter, he was continually so employed and continually rated competent in accordance with the official rating system of the Board of Public Education (Petitioner's Exhibit 1, R. 74). On June 25, 1952, pursuant to written instructions (Bd.'s Ex. 1, pp. 17, 21), he appeared in the Superintendent's office for an interview. This meeting was also attended by associate counsel for the Board of Public Education (R. 63). The Superintendent informed petitioner that he had received information relating to petitioner's alleged association with Communist organizations. The Superintendent said that he wanted to question petitioner about this information (R. 17, 18). Petitioner asked the Superintendent to disclose the information and the Superintendent declined to do so, but did ask one question, to wit: whether petitioner had been Press Director of the Professional Section of the Communist Political Association in 1944 (R. 19). Petitioner asked leave to consult

counsel. This was entirely satisfactory to the Superintendent and the meeting terminated (R. 19).

On October 14, 1952, the Superintendent again requested petitioner's presence in his office. Petitioner appeared and informed the Superintendent that he had consulted counsel who advised him that he could not legally be asked questions concerning his religious or political beliefs (R. 21). The Superintendent informed petitioner that this was a serious matter and his refusal to answer might lead to his dismissal. Petitioner, nevertheless, declined to answer the question which had been asked or questions of that type (R. 22). At that point the matter was dropped and lay dormant for thirteen months during which time petitioner continued to teach and continued to be rated competent.

On November 16-18, 1953, a subcommittee of the Committee on Un-American Activities of the United States House of Representatives held public, televised hearings in Philadelphia to which a large number of Philadelphia public school teachers and others were subpoenaed. Petitioner appeared before the subcommittee in response to its subpoena and was questioned about his past association with Communist organizations (R. 24-36). He stated that he was not then a member of the Communist Party, and that he had never advocated overthrow of the Government by illegal means (R. 34, 35), but he invoked the Fifth Amendment with respect to all other questions. He offered to discuss his own activities fully, provided the subcommittee would agree not to question him about other persons. The subcommittee chairman refused this offer, saying that the committee did not make "deals" with witnesses (R. 31).

On November 23, 1953, the Superintendent publicly announced the suspension of petitioner and twenty-five other teachers similarly situated.

Subsequently, the Superintendent preferred formal charges of "incompetency" and "persistent and wilful violation of the school laws" against petitioner, alleging as

the basis for both charges his refusal to answer the question asked by him, as well as petitioner's plea of the Fifth Amendment before the Congressional committee (R. 2-4).

A hearing was held on these charges before the Board of Public Education on December 22, 1953. The Superintendent was the Board's only witness. He testified to the facts related above.

The Superintendent also testified to the following significant facts: He stated that his reason for summoning petitioner to the interview was that he had information from an "unimpeachable" source relating to petitioner's loyalty, which information he considered to be "totally disqualifying" if true, and he wanted to ascertain its truth from petitioner (R. 17, 18). He acknowledged that all of the information in his possession and all of his intended questions related to Communist associations (R. 47).

The Superintendent also testified that, because of petitioner's refusal to answer his question in October, 1952, he then thought petitioner incompetent (R. 52, 59). Nevertheless, he did not inform the principal of the school in which petitioner taught (R. 59, 60), and took no action for more than thirteen months, i. e., until five days after the visit of the House Un-American Activities Committee to Philadelphia.

At the hearing, counsel for the Board conceded that petitioner's competency as a teacher was not in question (R. 53). He also acknowledged that with respect to the charge of persistent and wilful violation of the school laws, he knew of no school law which petitioner could be considered to have violated (R. 9).

Petitioner was present at the hearing and did not testify, nor did he decline to testify.[1] At the close of the hearing, counsel for petitioner stated that he was unable to

1. At the close of the hearing, one member of the Board stated a desire to question the teacher. Another member objected. Petitioner did not object. After some discussion among the members of the Board, the question was withdrawn (R. 70).

present evidence on the charge of persistent and wilful violation of the school laws because he could find no applicable school law (neither could counsel for the Board—R. 9) and that the evidence as to competency—twenty-three years of satisfactory ratings, the last of which followed petitioner's suspension by ten days—had already been presented in the Board's case (P.'s Ex. 1, P. 74), and that, since the actual character of the proceedings was an inquiry into loyalty, petitioner was entitled to a hearing under the Pennsylvania Loyalty Act. Counsel for petitioner invited the Board to undertake such a proceeding (R. 65, 66).

On January 7, 1954, a resolution of the Board of Education in the exact language of the charges was adopted by the Board by a vote of 14 to 1[2] (R. 75). Petitioner appealed to the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, who sustained the dismissal on the grounds charged by the Board. This decision was reversed by Court of Common Pleas No. 6, Philadelphia County, in an unanimous decision. The Court of Common Pleas was, in turn, reversed by the Supreme Court of Pennsylvania which, by a vote of 4 to 2, sustained the dismissal on the sole ground that the charge of incompetency was sustained by the evidence of petitioner's refusal to answer the Superintendent of Schools.[3] Upon the issue thus narrowed[4] by the decision of the Pennsylvania Supreme Court, this Court granted certiorari, 353 U. S. (Adv.) 964, 77 S. Ct. (Adv.) 1047.

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2. The only dissenting vote was cast by the President, Walter Biddle Saul, Esq.

3. This is explained in part by the decision of this Court in *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, which was decided while the instant case was before the Supreme Court of Pennsylvania.

4. It is interesting to note that the Court below was not quite so circumspect in the companion case of *Kaplan v. Philadelphia School District*, 388 Pa. (Adv.) 213, 226; 130 A. 2d 672, where it sustained both the ground of incompetency and of persistent and wilful violation of the school laws as its basis for suspension without pay pending the teacher's dismissal.

SUMMARY OF ARGUMENT.

It may be helpful to suggest preliminarily a number of issues previously considered by this Court which we believe are not involved in this case:

1. We concede at the outset the right of a state to dismiss from its employ persons who are shown in proper proceedings by competent evidence to be knowing members of subversive organizations. *Adler v. Board of Public Education of New York*, 342 U. S. 485; *Albert Appeal*, 372 Pa. 13, 92 A. 2d 663.

2. This Court has also held it permissible for state authorities to dismiss public employees for refusal to disclose knowing membership in known subversive organizations during a period in which such membership had *expressly been made unlawful* by City Charter for public employees. *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716.

3. It has also been established that a state may refuse public employment to those unwilling to swear that they are not at the time of their election or employment members of subversive organizations in which public employees are prohibited to participate. *Gerende v. Board of Supervisors*, 341 U. S. 56; *Fitzgerald v. Philadelphia*, 376 Pa. 379, 102 A. 2d 887.

4. Nor is this a case wherein a state has attempted, by virtue of a specific rule or regulation, to exclude from public employment those who refuse to testify about subversive activities. *Slochower v. Board of Higher Education*, 350 U. S. 551; *Board of Education v. Wilkinson*, 125 Cal. App. 2d 100, 270 Pac. 2d 82.

5. Nor is this a case in which the teacher had no tenure rights or was hired at the *discretion* of the school authori-

ties. *Faxon v. School Committee of Boston*, 331 Mass. 531, 120 N. E. 2d 772.

The issues in the case at bar, as distinguished from those mentioned above are, we believe, as follows:

1. May the Board of Education consistently with Due Process of Law infer incompetency from the refusal to answer a question?

2. Does dismissal for refusal to answer questions in an inquiry, whose authorization lies solely in an alleged traditional power of the Superintendent of Schools to "weed out unfit school teachers", violate due process because of

(a) its invasion of freedom of association without either ascertainable pertinency to that authorization or ascertainable relationship to a significant state interest; and

(b) its punishment of apparently innocent conduct without prior warning of the consequences of such conduct.

3. Does a dismissal under the stigma of disloyalty without a hearing on the issue of loyalty violate the constitutional rights of a public school teacher with tenure?

Our argument on these issues may be summarized as follows:

I. Petitioner's Refusal to Answer the Superintendent's Question Does Not Warrant the Inference of Incompetency.

A. Petitioner in good faith and upon advice of counsel refused to answer upon the ground that § 108 of the School Code of Pennsylvania [5] prohibits inquiry into the political affiliations of Pennsylvania school teachers. There neither was, nor is, any law of Pennsylvania authorizing a Superintendent of Schools to compel disclosure of teachers' political

5. Fn. 14, *infra*, p. 16.

affiliations and the Superintendent asserted no such statutory authority. The affiliation about which the Superintendent inquired was entirely lawful for public employees at the time of petitioner's alleged membership.

(1) Petitioner's refusal under these circumstances does not justify an inference of disloyalty, past or present, for the same reasons that a plea of the Fifth Amendment does not justify such an inference. *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) 252; *Slochower v. Board of Higher Education*, 350 U. S. 551; *Wieman v. Updegraff*, 344 U. S. 183.

(2) Petitioner's refusal to answer does not permit an inference of dishonesty because he told no lies and his refusal was made in good faith and reliance on advice of counsel.

(3) Nor does this refusal warrant any inference of lack of civic responsibility since petitioner simply obeyed the law which is the true measure of his duty.

(4) Nor can there be a justified inference of lack of cooperation because the Board could not legally require cooperation in an inquiry made without any legislative authorization under circumstances depriving petitioner of all possible procedural protections, particularly since the inquiry was solely a seeking for corroboration of information already in the possession of the Superintendent of Schools, relating to affiliations in the remote past, which affiliations involved no dangerous or subversive activities. *Sweezy v. New Hampshire*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1203; *Watkins v. United States*, 354 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1173.[6]

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6. In 1950, the Supreme Court of Pennsylvania held:

"For one to favor a 'little communism' does not mean that he favors the overthrow of our government by force or that he endorses any other illegal, immoral or unpatriotic program. On October 28, 1946 when the alleged libel was published, the relations between the United States and Russia were very friendly

B. The fact that the respondent Board took no action against petitioner for thirteen months following his refusal and in the meantime permitted him to be officially rated a satisfactory teacher amounts to an admission on the part of the Board that his refusal did not render him incompetent. He was really suspended and dismissed after and because of his plea of the Fifth Amendment before the House Un-American Activities Committee, which was removed from the case much later by reason of this Court's decision in *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, which was decided while this case was pending in the Pennsylvania Supreme Court.

Because of petitioner's statutory tenure rights, the Board had the burden of proving incompetency and since petitioner's contract with the school system at the time of the alleged association involved no obligation on his part either to avoid Communist organizations or to disclose past membership in them, his refusal to do so cannot be regarded as a breach of his contractual duty, and therefore it cannot provide sufficient evidence or, indeed, any evidence to sustain the Board's burden of proving incompetency (*Compare Konigsberg v. California State Bar Examiners*, 353 U. S. (Adv.) 252 where the burden was upon the applicant).

II. Dismissal of a School Teacher for Refusal to Cooperate in an Investigation Which Has No Legal Authorization Violates Due Process Because (a) It Is an Unjustified Invasion of Freedom of Association, and (b) It Punishes Apparently Innocent Conduct Without Prior Warning.

A. Inquiry into and compulsory disclosure of past political associations invades the freedom of association

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and the public mind had not then identified communism with Russian imperialism and terrorism.

. . . The Communist party and the Socialist party have had legal recognition in this country and in several campaigns they have nominated candidates for the presidency and these candidates have received many votes. The platforms of neither of these parties advocate anything unlawful."

because it acts as a prior restraint on future association, and the disclosure of unpopular associations tends to coerce individuals toward conformity and orthodoxy, not only in association but in belief and expression as well.

The asserted authorization for the inquiry in this case is found in the mandate of the Pennsylvania Constitution that the Legislature maintain a thorough and efficient system of public schools. The Legislature has not seen fit to implement this constitutional provision by any specific authorization of the investigation here involved. The resulting constitutional vices are as follows:

(1) The vagueness of the asserted authority aggravates the invasion of freedom because it gives unlimited scope to the investigation. Vagueness also prevents rational determination by the witness and by a reviewing court of the pertinency of the questions asked to that authority. It likewise prevents determination of the propriety of the inquiry in relation to its governmental purpose. Such inquiries, authorized in such broad terms, have been held invalid in *Watkins v. United States, supra; Sweezy v. New Hampshire, supra; Raley v. Ohio*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1391; *Morgan v. Ohio*, 354 U. S. (Adv.) —, 77 St. Ct. (Adv.) 1403. The absence of specific authority in this case brings it within the condemnation of those decisions.

(2) The interest of the state, either in self-protection or in the maintenance of a thorough and efficient public school system does not justify this invasion because (a) the danger of harm from the asserted evil, which is the object of the inquiry, is too remote in the absence of any charge of insidious teaching or any evidence thereof, and (b) the danger to freedom resulting from inquiry into political association and the attendant pressures toward conformity among school teachers are antithetical to democratic education, which demands freedom rather than orthodoxy. *Sweezy v. New Hampshire, supra.*

B. Dismissal for apparently innocent conduct without prior warning of the consequences is fundamentally unfair.

(1) The legislative situation in Pennsylvania as it existed at the time of the inquiry created a trap for petitioner. The Board of Education proceeded against him under the Teachers' Tenure Act. In 1949, the Legislature had added subversive activities as a ground for dismissal under the Teachers' Tenure Act. In 1951 the Legislature repealed this provision and enacted in its stead a comprehensive and exclusive statutory scheme for the investigation and processing of cases involving subversive activities of public employees.[7] The Board of Education in this case concedes that it did not have such information against petitioner as would warrant the initiation of proceedings under the Loyalty Act,[8] and so it ignored the Loyalty Act and proceeded instead under the Tenure Act, notwithstanding the repeal of its subversive provision.

The Board had insufficient evidence of disloyalty, and so it charged petitioner with incompetency of which it had no evidence.[9]

(2) Petitioner having complied with all the requirements of the Loyalty Act [10] justifiably believed he was entitled to rely upon the legal prohibition against political tests for school teachers. He therefore refused to answer the Superintendent's question. To dismiss him for this conduct in the absence of any warning by statute, rule or regulation is fundamentally unfair. It is also discriminatory because it allowed the Board to deprive petitioner of all the procedural protections of the Pennsylvania Loyalty Act and, in fact, vests unbridled discretion in each of the

7. The pertinent provisions of the Pennsylvania Loyalty Act are quoted in the Appendix.

8. Cf. fn. 29, *infra* p. 26.

9. Cf. P's Ex. 1, R. 74, which shows twenty-three years of satisfactory ratings, some of which are after the conduct which is now said to show his incompetency.

10. See fn. 6, *supra* pp. 9-10.

hundreds of school boards of the Commonwealth either to grant or deny to their professional employees the rights granted by that Act.

Membership in the Communist Political Association, the Communist Party and other organizations now believed to be subversive, was entirely lawful in Pennsylvania for public employees and all others during the entire period of petitioner's alleged affiliations.[11] It is unfair for the state to insist in 1952, that an individual employee ought to have recognized in 1944 a danger which the state itself had not legislatively recognized.

III. Dismissal Under a Stigma of Disloyalty Without a Hearing on Loyalty is a Deprivation of Liberty and Property Without Due Process of Law.

A. Petitioner's dismissal carries such a stigma. Although the Board of Education steadfastly maintains that this was not a loyalty proceeding, petitioner was undeniably discharged because of his suspected disloyalty. The economic consequences of such a discharge and the opprobrium to which it subjects the employee make it imperative that he be granted a hearing on the issue of his loyalty before such action is taken against him. This was denied him.

B. Whatever the motivation for the dismissal, it is as much a penalty as the dismissal for refusal to take the loyalty oath which this Court condemned in *Wieman v. Updegraff*, 344 U. S. 183. The Board's contention that petitioner was granted a hearing on competency is *unavailing* because:

(1) As a matter of fact petitioner had no such hearing. On the contrary, since petitioner had for twenty-three years consistently been rated competent and since his pedagogical

11. Fn. 6 *supra* pp. 9-10.

competency under the state rating system was conceded by the Board, the so-called competency hearing was a sham.

(2) The denial of a hearing on loyalty in this case is no less a deprivation of procedural due process of law than the similar proceedings condemned in *Slochower v. Board of Higher Education*, 350 U. S. 557 and *Wieman v. Updegraff*, 344 U. S. 183.

In short, petitioner was dismissed because of suspected disloyalty on the ground of incompetency without any evidence either of disloyalty or of incompetency and without a hearing on either loyalty or competency when the uncontroverted evidence, in fact, shows him to be both loyal and competent. This result was accomplished in disregard of and, in fact, in violation of the Pennsylvania Loyalty Act.

The investigation, and the dismissal for failure to cooperate in it, proceeded from the state's concern with subversion, which, in the absence of any evidence of such danger is insufficient to warrant compulsory disclosure of past innocent political associations, because such disclosure restricts free association, expression and belief and its tendency toward compelled conformity is detrimental to the very educational process it pretends to protect.

Hence, the decision below should be reversed.

ARGUMENT.

I. Refusal to Answer a Question as to Past Political Association Is Not Rational Evidence of the Incompetency of a Public School Teacher and Dismissal Upon That Ground Is Arbitrary and Discriminatory.

A. The Evidence.

The evidence shows that for thirteen months after petitioner's refusal to answer the Superintendent's question, the Board took no action. It shows that he was not charged with this refusal alone; rather, both the occasion and a major reason for petitioner's discharge was his appearance and plea of the Fifth Amendment before the House Un-American Activities Committee. The Fifth Amendment was an important element of the charges throughout all of the proceedings below until this Court decided *Slochower v. Board of Higher Education of New York*, 350 U. S. 551. That decision occurred between the argument and reargument of this case in the Supreme Court of Pennsylvania. It was only then and on that account (R. , 386 Pa. at p. 94) that the Fifth Amendment plea was eliminated from the case. The Board now finds itself in the position of attempting to sustain the dismissal upon what is really an afterthought in the charges against petitioner.

The question asked by the Superintendent is "Were you in 1944 Press Director of the Professional Section of the Communist Political Association?" (R. 19). In 1944, and until its outlawry by the Act of December 21, 1951, P. L. 1712 § 1 (18 Purdon's Pa. Stats. Ann. § 3811), the Communist Party was not illegal in Pennsylvania for public employees or others.[12] The Communist Political Associa-

12. Cf. Jones, C. J. dissenting, 386 Pa. 82, 103. (R.) and fn. 6 pp. 9-10 *supra*.

tion, which replaced the Communist Party from August, 1944 to July, 1945, has never been considered illegal.[13]

After the Superintendent asked his question, petitioner asked leave to consult counsel. This was granted. At the second interview three months later, he informed the Superintendent that counsel had advised him that he could not lawfully be asked questions concerning his political or religious beliefs.[14]

B. The Inferences.

In *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) 252, this Court held, with respect to an applicant for the Bar, that an inference of bad moral character from refusal to answer questions relating to Communist associations was unwarranted. We submit, here, that for the reasons stated in the *Konigsberg* decision there is no permissible inference of incompetency from petitioner's refusal.

Respondent forswears any inference of disloyalty and relies upon inferences of dishonesty, lack of civic responsibility and lack of cooperation. None of these inferences is warranted.

1. *There Can Be No Inference of Disloyalty.*

First, we concur, of course, in the Board's disavowal of the inference of disloyalty.[15] It seems to us that this

13. *Dennis v. United States*, 341 U. S. 494, 498, Footnote 1.

14. This advice appears to have been sound indeed, for the School Code of Pennsylvania provides, "No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee or employe in the public schools of this Commonwealth." Act of 1949, March 10, P. L. 30, Art. I, § 108; 24 Purdon's Pa. Stats. Ann. § 1-108.

15. In its Brief in Opposition (hereafter referred to as Br. Opp.) to the Petition for Certiorari, the Board states, "The Board of Public Education did not base its finding of incompetency on any assumption or inference that the petitioner was disloyal, because he had refused to answer the questions relating to alleged former subversive activities." (p. 7)

refusal stands logically in the same posture as a refusal to answer on the ground of the Fifth Amendment. Since either an innocent or guilty man might refuse on the same ground, it is impossible to decide from the mere fact of refusal into which category the refusing individual falls. The reason stated by petitioner for his refusal to answer, to wit, that counsel had advised him that he could not legally be asked questions concerning his political or religious associations,[16] is strikingly similar to the reason given by Konigsberg for his refusal. The inference is equally unwarranted here.

2. *There Can Be No Inference of Dishonesty.*

Petitioner told no lies and evaded no questions. The record is devoid of any evidence to show that his answer was made in anything but good faith. Unlike *Konigsberg*, there is not even evidence that he answered the question at one point and later refused. The same may be said of his appearance before the Congressional Committee.[17] There, upon advice of counsel, petitioner refused to answer those questions as to which he believed the Fifth Amendment gave him the right; others he answered fully. In addition, he offered to discuss all of his own activities, but not those of other persons. The offer, of course, was declined (R. 31). Furthermore, he denied any present Communist Party membership (R. 34, 35). He had done the same thing in accordance with the requirements of the Pennsylvania Loyalty Act in 1952.[18] His position through-

16. Cf. Footnote 14, *supra*, p. 16.

17. Although this appearance has been eliminated as a basis for decision, it is nevertheless relied upon to some extent by the Court below. 386 Pa. 82; 125 A. 2d 327, *passim*. (R. 113, et seq.).

18. It should be noted that the oath required by the Pennsylvania Loyalty Act reads in the present tense and requires no information as to past beliefs or activities. Similarly, the criterion for dismissal under the Loyalty Act is whether or not the teacher is a subversive person *at the time of his hearing*. Act of 1951, Dec. 22, P. L. 1726, § 5, 65 Purdon's Pa. Stats. Ann. § 215 (App. 3a, 4a).

out was entirely consistent and perfectly honest, with respect for and reliance upon, the law.[19]

3. *There Can Be No Inference of Lack of Civic Responsibility.*

As to the inference of lack of civic responsibility, we submit that the law is the true measure of civic responsibility and that, since this teacher adhered, on advice of counsel, to the law which prohibits inquiry into a teacher's political activities, he cannot be said to be derelict in his civic responsibility. As Judge Lazansky, in a braver day, said in *Matter of Ellis*, 26 N. E. 2d 967, 282 N. Y. 435:

> "The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty."

Petitioner's statutory privilege places him in the same position.

4. *There Can Be No Inference of Lack of Cooperation.*

The inference of lack of cooperation is equally unfounded. Let us first consider: What was the cooperation demanded?

(1) We begin with the fact that the Superintendent already had the information which he sought from petitioner (R. 17, 18).

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19. An analogy may help: We are all familiar with the ancient and continuing debate as to whether the child who tells the unwelcome caller that her father is not at home, when she means "not at home to this caller", tells a lie. However we answer that question, no one could find any hint of dishonesty if the child were to say, "It's none of your business whether my father is at home." In the same fashion we deny the inference of dishonesty from petitioner's refusal to answer the Superintendent's question.

(2) All of that information had to do with alleged *past* subversive or Communist associations (R. 52, 59).

(3) The Superintendent refused petitioner's request to tell him what the information was or what the questions were which he proposed to ask (R. 19).

(4) Neither the Superintendent nor the Board to this day has advanced any specific statutory authority for the inquiry.

(5) The circumstances of the questionings, in the secrecy of the Superintendent's office and in the presence of associate counsel for the Board, with no apparent limitation on the subject matter, with no procedural protections for petitioner, enhance the unreasonableness of the required cooperation. Petitioner was alone and uncounseled. There was no available judicial protection for whatever rights he desired to assert. This inquiry, in fact, rather resembled a scene in a police interrogation room than any investigation known to the law.

Petitioner did not "cooperate" in this interrogation. Does the law require this cooperation? We respectfully submit that the decisions of this Court in *Watkins v. United States*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1173; *Sweezy v. New Hampshire*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1203; and *Raley v. Ohio*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1931, compel the conclusion that the "cooperation" demanded cannot legally be required of a public school teacher.

The vices of this inquiry far exceed the mere matter of the breadth of its scope as in the cases just cited. The manner in which it was conducted adds such procedural defects as to make it intolerable in the light of the First and Fourteenth Amendments. Hence, there was no such lack of *legally required* cooperation as to allow the inference that petitioner failed to perform his duty as an employee of the public school system.

C. The Thirteen-month Delay Negates the Inference of Incompetency.

Petitioner's refusal occurred October 14, 1952. Nothing happened for thirteen months thereafter. Then, on November 16, 1953, came the House Committee, with its radio and television, cameras and microphones, reporters and photographers, crowds and headlines.[20] This spectacle was followed by demands for action from editorial writers and veterans' groups, and the Board promptly obliged. Five days after the hearings, twenty-six teachers were publicly, summarily suspended.

The Superintendent testified (R. 52, 59) that at the time of the refusal he thought petitioner was incompetent but took no action because of his consideration for the teachers involved (R. 59, 60). In view of the fact that he had all of the information before he began the inquiry in June, 1952, and that there was no change in circumstances from then until the visit of the House Committee, this explanation seems incomplete. The fact that he allowed satisfactory ratings to be entered on petitioner's record in the interim (P.'s Ex. 1, R. 74) shows that he did not seriously regard this refusal as a disabling factor.

D. The Narcotics Peddler Analogy Is Inapposite.

1. *The Distinction.*

Before leaving the question of permissible inferences from refusal to answer, we should deal with one hobgoblin constantly alluded to by the Board, the Court below and some proponents of the stealthy erosion of civil liberties. This is the hypothetical case of the Superintendent of Schools questioning a teacher about his association with persons distributing narcotics to school children. The conclusion is drawn that no thinking person with any feel-

20. Cf. Footnote 43, *infra* p. 38.

ing for the welfare and safety of our school children would for a moment permit reticence on such a question to go unpunished by summary dismissal. The argument then continues that, since Communism is equally abhorrent in American schools, recalcitrants on that subject should meet with the same fate.

Our position on this question is as follows:

First, we do not believe that a logical inference of guilt may be drawn from refusal to answer a question, no matter what crime is suggested by the question.

Second, we do not believe it is reasonable to say that refusal to answer a question proves a person dishonest, at least under circumstances where a specific legal prohibition against asking the question is invoked in good faith.

Third, when it comes, however, to the question of inferring lack of civic responsibility and cooperation from a school teacher's refusal to answer questions concerning dispensing narcotics to the students, the answer must be different. We believe that in such a case, this unfavorable inference is permissible because it may fairly be said that protection of school children is a part of the job of a school teacher.[21] It is one of the things which he has contracted to do for his employer. He has made no contract regarding his lawful political associations.

Fourth, the analogy is false: a proper analogy in the field of narcotics would be the question as to whether the teacher had been personally *an addict*, not whether he had imposed his addiction upon the children. There is a vast difference between a refusal to answer the question of

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21. It would be no different were a police officer to refuse to answer questions concerning crimes he was appointed to investigate. Cf. *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248 and *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245, which are constantly cited by respondent in support of its argument.

whether appellant *taught* Communism (sold dope) and whether he had *been a Communist* (an addict). By insistant thrusting forward of this dope peddler bogey, the School Board seeks to bridge the gap between legitimate state interest, justifying even interrogation, in what is *taught* and illegitimate compulsory disclosure of the personal infirmity of the teacher.

Furthermore, narcotics peddling can hardly be said to have the preferred position of political association and therefore the one who is questioned regarding narcotics has nothing to weigh in the balance against the obvious need to protect school children from drugs. On this basis we submit that the narcotics analogy does not apply here.

2. *The Garner Rationale Does Not Apply.*

But respondent answers that this Court has held:

> "A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds towards the society in which he lives. In this the state has a vital concern. . . ." *Adler, et al. v. Board of Education of the City of New York*, 342 U. S. 485, 493.

Respondent therefore concludes that disloyalty is every bit as important as narcotics. We agree on the importance of loyalty but we submit that the Board's equation erroneously oversimplifies the problem. It ignores the fact that the affiliations here involved are not only legally important but also within the protection of the First Amendment and are not alleged as having any influence on petitioner's classroom conduct.

In the first place, the rationale of the *Adler* decision, repeated in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, 720 and *Gerende v. Board of Supervisors*, 341 U. S. 56, has been held to justify only *prospective legislation* specifically dealing with loyalty and it has

not been extended beyond *Adler, Garner* and *Gerende*. It has been unsuccessfully advanced as justification for the type of inquiry here involved in *Wieman, Watkins, Slochower* and *Sweezy*, all *supra*.

The importance of loyalty may indeed justify specific, prospective prohibition of association, but it is unfair to use it retroactively to punish apparently innocent association of whose dangers or subversive character the individual may well have been unaware.[22]

E. The Burden of Proof Is on Respondent.

We believe that this Court's Decision in *Konigsberg v. State Bar of California, supra*, justifies our position. But this case is even stronger for one further reason. Konigsberg, as the Court noted, was an applicant for admission for the Bar and, as such, had the *burden of proving* his good moral character to the State Bar Committee. In this case, we are dealing with a school teacher of twenty-three years standing who, by statute, has a contract with the Commonwealth of Pennsylvania which guarantees his academic tenure. Among the procedural incidents of tenure is the rule that in any dismissal proceeding, the burden of proof is upon the Board of Education.[23]

If Konigsberg's refusal to answer as to past and present Communist affiliations would not justify the suggestion that he had failed to sustain his burden of proof as to good moral character, then certainly petitioner's refusal to answer as to only past associations does not satisfy respondent's burden of proof that he is incompetent to teach.

For these reasons we submit that petitioner's refusal to answer the Superintendent's question does not allow an

22. "They had joined, (but) did not know what it was; they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something." Testimony of J. Edgar Hoover, quoted by Mr. Justice Clark in *Wieman v. Updegraff*, 344 U. S. 183, 190.

23. *In re Swink*, 132 Pa. Super. 107, 200 Atl. 200.

inference of incompetency either directly or through the intermediate inferences of disloyalty, dishonesty, lack of civic responsibility or lack of cooperation and that the respondent has failed to sustain its burden of proving incompetency.

II. Dismissal for Refusal to Answer a Question in an Investigation Conducted Without Specific Legislative Authority and Without Warning of the Consequences of Such Refusal Violates Due Process.

A. Such an Inquiry Is an Unjustified Invasion of Freedom of Association.

This Court has held in *Watkins v. United States*, 354 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1173; *Sweezy v. New Hampshire*, 354 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1203; and *Raley, et al. v. Ohio*, 353 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1931, that broadly based inquires in the area of free speech and association are improper because (1) the inquiry itself is a measure of governmental interference with the protected freedoms,[24] and in addition, (2) the vagueness of the investigator's authorization makes it impossible for the witness to determine the pertinency of the questions asked him,[25] or (3) for the Court to determine the propriety of the questioning in relation to its authorization or to a legitimate governmental purpose.[26]

Each of these vices is present in the case at bar.

1. *The Alleged Authority for the Investigation:*

Let us first consider the authority for this investigation. The Court below quotes with approval the authorization suggested in respondent's brief as follows, 386 Pa. at p. 90 (R.):

24. *Watkins v. United States*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1173.

25. Id., *Sweezy, supra*, 77 S. Ct. 1203 at 1211.

26. Id., 77 S. Ct. 1203 at 1217-1218.

> " 'The State Constitution requires the General Assembly to maintain a thorough and efficient system of public schools. The School Code is the legislative implementation of this Constitutional duty. The rights and duties of a Superintendent have grown with custom and with professional usage. Many of his duties are imposed on him by tradition. It is one of his duties under the School Code to make sure that the teaching staff is competent, and therefore to weed out professionally unfit teachers. This is a continuing process that the Superintendent carries on. The Superintendent has the power and the duty, whenever the facts indicate the need, to inquire into and reevaluate the fitness of a teacher. Unquestionably there is a reciprocal duty on the part of the teacher to fully and frankly cooperate. He may not block such proper inquiry by secretiveness or concealment."

Thus, we see a "traditional" power of inquiry derived from the constitutional mandate to maintain a thorough and efficient system of public schools. The only limitation on the scope of the investigation is "fitness of the teacher".

Prior to 1949, the Teachers' Tenure Act contained no provision for discharge of teachers on account of subversive activities. In 1949, the Act was amended to add as a ground for dismissal "advocation (sic) of or participating in Un-American or subversive doctrines." In December, 1951, the legislature of Pennsylvania enacted the Pennsylvania Loyalty Act, known as the Pechan Act.[27] By § 16 of the Pechan Act, the legislature specifically repealed the 1949 amendment to the Teachers' Tenure Act, thus removing subversive activities as a ground for dismissal under that Act. The Pechan Act applies in terms to all "teachers and other employees of the Public School System", and, in addition, provides in § 15:

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27. Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stats. Ann. § 210-226.

"No procedure provided by an existing tenure or civil service law shall be applicable in any proceeding under this Act." [28]

The legislative situation, therefore, appears to be (1) that any authority previously to be found in the Teachers' Tenure Act for investigation of, or dismissal for, causes relating to subversive activities was repealed by the Pechan Act in 1951 and that all such authority has, since then, been found in the Pechan Act, which the Board of Education declined to follow.[29]

The Board thus finds itself in a legislative void concerning the authorization for this inquiry; and so it has been obliged to revert to the general school system provision of the Pennsylvania Constitution of 1874 [30] to find foundation for the investigation.

The relative vagueness of this authority and those considered in *Watkins, Sweezy, Morgan* and *Raley,* all *supra,* need not be labored. By comparison with those cases, we submit that the invasion of liberty is at least as great and the criterion of pertinency and necessity is far more vague.

2. *The End Does Not Justify the Means.*

Chief Justice Marshall, as long ago as *McCulloch v. Maryland,* 4 Wheat. 316 (1819), posited a basic test of the validity of governmental action infringing on individual liberty as a matter of *ends and means.* In that view, there

28. Act of 1951, P. L. 1726 § 15a, 65 Purdon's Pa. Stats. Ann. § 225a.

29. In its brief in the Court below, p. 8, the Board went so far as to say,

"Dr. Hoyer received information from responsible government officials that Mr. Beilan was, or had been, a member of the Communist Party over a period of years; the most recent date of such association being prior to the effective date of the Pennsylvania Loyalty Act. *This precluded any action by the Board of Public Education under the Loyalty Act,* . . . ." (Emphasis supplied.)

30. Purdon's Pa. Stats. Ann. Const. (Art. X, § 1).

are certain legitimate governmental objectives, and state action must depend for its validity upon its tendency to the accomplishment of one of those objectives. The means must be reasonably calculated to achieve the end sought and, granted alternative means, the method chosen must not be unnecessarily oppressive to the individual affected.[31] (Cf. *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U. S. 123, 162-3.) Analyzed in these terms, we submit that the state action in the case at bar offends the due process clause.

The governmental objective asserted as the justification for this inquiry is "the maintenance of a thorough and efficient system of public schools." That this is a legitimate governmental objective cannot be denied. The breadth of the inquiry permitted by such an objective, however, is equally undeniable; particularly as construed by the Court below to permit the questioning of a professional employee of the school system upon any matter "pertinent to his fitness". In this case, it obviously includes past lawful, political associations.

The question then becomes whether or not this purpose justifies the action of the Superintendent in this case. We submit that it does not for three reasons:

(1) The *area* of questioning in this case covered exclusively matters protected by the First Amendment.

(2) The very *breadth* of the inquiry makes it too great a threat to the liberty of the teacher.[32]

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31. *Buck v. Bell*, 274 U. S. 200; *Carolene Products v. U. S.*, 304 U. S. 144, Ftnote. 4; *Nebbia v. New York*, 291 U. S. 502; *Liggett Co. v. Baldridge*, 278 U. S. 105; *Weaver v. Palmer Bros. Co.*, 270 U. S. 402; *DeJonge v. Oregon*, 299 U. S. 353; *Hague v. CIO*, 307 U. S. 496; *Lovell v. City of Griffin*, 303 U. S. 444; *Schneider v. New Jersey*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Thomas v. Collins*, 323 U. S. 516.

32. Cf. *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Connecticut*, 310 U. S. 296.

(3) Inquiry into past lawful, political associations of school teachers is not calculated to make the school system either thorough or efficient.

1. If teachers, as a class, are to be subject to compulsory disclosure of legal past political affiliations, the public school system will have available to its professional staff only the most orthodox minds, and, more unfortunately, only those by whom such inquisition is likely to be suffered rather than resisted. A staff of teachers submissive and complaisant to forced interrogation in this or related fields will hardly be counted upon to tolerate, let alone stimulate free trade in ideas in the classroom and thus the tendency of such inquiry is antithetical to the freedom of thought and expression essential to the educational process.

2. Vagueness aggravates the invasion and obfuscates the determination of pertinency and propriety. In *Sweezy v. New Hampshire, supra,* this Court was faced with the problem of the relationship between an investigation and its legislative authorization. The authorization was found to be so broad and the questions resisted so remote from its asserted purpose as to amount to an abdication by the legislature of the responsibility attendant on the inquiry. The vagueness of the enabling act made it impossible for the Court to determine whether the total interest of the state as related to the particular inquiry justified the invasion of liberty involved.

In the case at bar, the character and extent of the invasion is approximately the same. The asserted interest of the state is different. It seems that the state conceives that its school system cannot be thorough and efficient if its students are exposed to radical political ideas, even in the absence of either evidence or suggestion that petitioner or any other teacher ever taught any such thing. If this be the real interest of the state in this case, we

respectfully submit it justifies no inquiry whatever, because it is then a direct infringement on freedom of belief and expression without any necessity.

If, on the other hand, the real state interest in this case is self-protection, then the inquiry stands on no better footing than those considered in *Watkins, Sweezy, Morgan* and *Raley*, all *supra*. For here we have a seeking for corroboration of information already in the possession of the Superintendent from one, who at the time of his questioning, was not involved with any advocacy or teaching of the violent overthrow of the government, whose asserted associations were all perfectly lawful and in the remote past and as to whom the respondent board has conceded [33] it did not have sufficient information to institute proceedings, even under the all-embracing terms of the Pennsylvania Loyalty Act. Since the evidence and the concessions of record so far remove this petitioner from the battlefield of advocacy of violent overthrow, the inquiry into his associations and beliefs cannot be justified, except upon the forbidden theory of total, unrestricted warfare against unpopular ideas, neither alleged nor proved to have been taught in the classroom.

The invasion of liberty resulting from compulsory disclosure of past lawful, political associations is so great that it cannot be countenanced as an assertion of the state's power of self-protection or its power to maintain a thorough and efficient system of public schools and it does not matter whether the power be asserted pursuant to specific legislative authorization, vague legislative authorization or no legislative authorization.

Since thorough and efficient education demands the utmost freedom of inquiry, belief and association for teachers, and since inquiry into political associations and compulsory disclosure thereof tends to inhibit that freedom, such inquiry militates against, rather than in favor of the

33. Cf. Footnote 29 *supra*.

maintenance of a thorough and efficient system of public schools.

Hence, we submit, the dismissal for refusal to answer the Superintendent's question violates due process.

B. Dismissal of a School Teacher for Refusal to Answer Questions Relating to Past Political Associations Without Specific Pre-existing Legislative Authorization Is Fundamentally Unfair.

In *Konigsberg, supra,* the majority opinion suggests,

> "Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to reply."[34]

The Court found it unnecessary to reach that question in Konigsberg's case because the Board of Law Examiners had based their exclusion on Konigsberg's failure to prove his good moral character and the Court therefore had only to find that his refusals to answer did not warrant the inference of bad moral character. The same might be said in this case. We have previously argued (Section I, *supra*) that petitioner's refusal to answer does not warrant the inference of incompetency either directly or through the intermediate steps of disloyalty, dishonesty, lack of civic responsibility and lack of cooperation.

In this case, however, that rationale may not be entirely satisfactory, for the label of incompetency is nothing more than a convenient stick chosen by the Board to beat its dog for refusing to answer its questions. We believe that the label of incompetency was employed, as stated by the Court of Common Pleas (R. 112), as "an expedient short-

34. 353 U. S. (Adv.) —, 77 S. Ct. 722 at p. 727.

cut". It is inescapable that petitioner was dismissed for failure to answer the Superintendent's question and that offense, whether it be called incompetency, bad moral character, suspected disloyalty, or murder, has been and remains the gravamen of the complaint. Therefore, we come to the question whether a state may dismiss a teacher solely for refusal to answer a question about past political association in the absence of any warning by virtue of pre-existing law or regulation.

It is clear from the *Garner* case, *supra*, that dismissal for refusal to disclose past association with subversive organizations during a period when such associations were specifically prohibited by law for public employees is valid, so long as the requirement of disclosure includes only organizations in which the employee was involved with knowledge of their subversive purpose.

It will be noted that in the case at bar, we have no applicable prohibition of such membership, nor have we any statute, ordinance, rule or regulation which provides for dismissal upon refusal to make such disclosure.

Petitioner's position is that dismissal under these circumstances is a dismissal for innocent conduct of whose consequences there was no prior warning and it is therefore fundamentally unfair. Mr. Justice Sutherland's famous statement in *Connally v. General Construction Co.*, 269 U. S. 385, provides our point of departure:

> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

We believe the argument is much stronger in this case for four reasons:

(1) Here we have no law at all which condemns the conduct in question.

(2) The offending governmental agent expressly disavows the only law which purports to cover the subject matter.

(3) The conduct for which the penalty is imposed is acknowledged to have been innocent when it took place.

(4) The conduct involved is political association protected by the First Amendment.

The legal situation existing in Pennsylvania at the time of the questioning involved here was more than simply vague. A series of legislative actions seems to have combined to create a trap for petitioner and those similarly situated. Petitioner felt entitled to rely upon the prohibition of political tests for school teachers.[35] This reliance was enhanced by the repeal of the subversive provision of the Teachers' Tenure Act. Any apprehension which might have been created by the Loyalty Act was assuaged by his compliance with its present tense oath requirement and respondent's disavowal of its applicability.

Petitioner very quickly discovered that his reliance was misplaced. The trap concocted by the Board of Education is made up of those two greatest offenders against due process and fundamental fairness—retroactivity and vagueness. But worse, the trap was laid on the field of free speech.[36] This Court characterized Konigsberg's similar refusals as "not frivolous" (353 U. S. (Adv.) —, 77 S. Ct. 722 at 732, fn. 30 and cases there cited).

In *Garner*, the State of California officially recognized the dangers of Communist organizations and the legislature amended the Los Angeles City Charter to prohibit membership therein by City employees. Pennsylvania did no such thing. The Pennsylvania Legislature officially recognized

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35. Footnote 14, *supra*, p. 16.

36. Cf. *Thornhill v. Alabama*, 310 U. S. 88.

the danger and condemned the organizations in 1951. Now it attempts to punish its employees for not having recognized the evil sooner than the State did. This is unfair.

The Superintendent's Warning

The record shows (R. 22) that after petitioner told the Superintendent that counsel had advised him against answering the question asked or similar questions, the Superintendent said,

> "I indicated to Mr. Beilan that this was a very serious and very important matter and that failure to answer the questions might lead to his dismissal . . . ; it wasn't a question of idle curiosity on my part, but that it was a real question of fitness for him to be a teacher or to continue in the teaching work.
>
> I think that is the gist of what happened on that occasion."

The Board may assert that this admonition constitutes fair warning of the possible consequences of petitioner's reticence. We respectfully submit that, in the light of the record, it does not.

In the first place, the very language used by the Superintendent, that he "indicated" his threat to petitioner and that the threat was only that the refusal "might" lead to his dismissal is so attenuated a warning as to be no warning at all. And the Superintendent was uncertain whether he even said this much.

Added to this we have another important factor—the absence of any law, rule or regulation which might give credence to the Superintendent's assertion. Furthermore, petitioner justifiably relied upon the advice of counsel to the effect that the law prohibited this questioning. These factors so adulterate the alleged "warning" as to make it unmarketable. This warning certainly does not measure

up to the warnings given Konigsberg by the California State Bar Committee.[37]

These considerations, we submit, require the conclusion that a "brand new exclusionary rule"[38] was applied to petitioner without justification in any law of the state and without warning of the consequences of his action.

This dismissal is an unconstitutional discrimination.

The state of affairs, left by the Court below, permits the School Boards of the hundreds of school districts of Pennsylvania, not to mention other states, to choose for themselves whether they will pursue, as respects any given teacher, the provisions of the Loyalty Act, with all its procedural protections, or to shortcut that procedure by the use of the vague provision of "incompetency" in the Teachers' Tenure Act. To leave it to administrative authorities, in their unbridled discretion, to decide such a question allows an opportunity for discrimination and denial of equal protection of the laws too clear for cavil. That discrimination is apparent on the face of this record.[39]

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37. Cf. 353 U. S. (Adv.) at p. 252 et seq. (*Dissenting Opinion*) at p. 274.

38. *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) at p. 261.

39. It is interesting to compare other decisions of the Court below on similar questions. A county judge (now Associate Justice of the Supreme Court of Pennsylvania) was held to lack this power of inquisition with respect to an attorney (*Schlesinger's Petition*, 367 Pa. 476, 81 A. 2d 316) and with respect to a grand juror (*Commonwealth ex rel. Roth v. Musmanno*, 364 Pa. 359, 72 A. 2d 263). Similarly, an attempt on the part of the Attorney General to question an assistant district attorney as to allegedly subversive associations was held by the Court below to be "contrary to the spirit of all our laws which so jealously guard the rights of the individual." (*Matson v. Jackson*, 368 Pa. 283, 290, 83 A. 2d 134). Cf. Musmanno, J. concurring with reservation, 386 Pa. at 97:

> "I believe that counsel for the defendant here were fully justified in advancing the *Roth* and *Schlesinger* decisions in support of their erroneous position that Beilan was not accorded due

The discrimination thus permitted in this case and the potentiality for discrimination allowed by the decision below is too potent a threat to the political liberties of those citizens of the United States who happen to be employees of the Commonwealth of Pennsylvania to be permitted by the Fourteenth Amendment.

III. Dismissal of a Public School Teacher Under a Stigma of Disloyalty, Without a Hearing on Loyalty, Violates the Due Process Clause of the Fourteenth Amendment.

A. This Is a Loyalty Case.

Throughout these proceedings, respondent has been pathetically anxious to convince the Court that this is not a loyalty case. Respondent's Brief in Opposition in this Court states at p. 2,

> "This teacher was not charged with disloyalty. He was not discharged because of disloyalty."

The Board in this respect seeks to run with the hare and stand with the hounds, to take advantage of all possible benefits from the loyalty aspect of the case,[40] while ignoring its burdens.

At petitioner's hearing before the Board, in colloquy between the president of the Board and its counsel, the

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process of law, because if Alice Roth, in her case, was not accorded due process of law, then Beilan was denied it also. If Schlesinger was entitled to a writ of prohibition against the presiding judge in his case, Beilan should have asked for an injunction against the Philadelphia Board of Public Education in this case."

40. Br. Opp. at p. 7, Fn. 1, quotes at length from this Court's decisions in *Adler* and *Garner*, *supra*, about the importance of loyalty as a quality of a teacher.

schizophrenic character of the Board's position was made eminently clear.[41]

Additional evidence of the Board's preoccupation with loyalty was the introduction in evidence and the verbatim reading at the hearing before the Board of the entire transcript of petitioner's testimony before the Congressional Committee (R. 24-36).

The Superintendent of Schools in his testimony acknowledged that all of his questions had to do with loyalty (R. 17, 18, 47). The opinion of the Superintendent of Public Instruction (R. 76-97) shows clearly that he was influenced largely by considerations of loyalty (R. 76-97). The Court of Common Pleas found as a fact that that was the Board's interest (R. 106) and Chief Justice Jones says in his dissenting opinion,

> "The learned Court below had not the slightest difficulty in seeing through the gossamer with which the Board obscures the real basis for its dismissal of Beilan. It presumes to say that its action was wholly unrelated to any question of Beilan's loyalty. The Court concluded, however, that 'the proceedings before the Board of Education were actually concerned solely with the question of (Beilan's) suspected disloyalty.'

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41. "Mr. Rhoads: . . .

Now, so far as I am concerned, sir, and so far as my presentation of testimony is concerned, I don't think whether this man is loyal or disloyal has anything to do with this case. And if your counsel's advice were being asked in the matter, I should say that any testimony directed toward present loyalty or disloyalty is completely out of the case.

* * *

"Mr. Saul: And are you saying to the Board now that in making our decision we are not to be influenced by any thoughts or any ideas that we have as to loyalty or disloyalty?

"Mr. Rhoads: I can't say what thoughts are going to influence you, Mr. President, or anybody. I am saying that these charges are not directed toward loyalty, and beyond that I couldn't go. I couldn't possibly answer your question." (R. 12, 13.)

With that conclusion, I thoroughly agree." 386 Pa. at p. 105, 125 A. 2d at 338.

The Court below, while it accepts the Board's rationalization of its action, nevertheless, betrays its own concern with the loyalty issue.[42]

And in this Court, the true character of the proceedings is again spelled out in the following enigmatic statement in the Board's Brief in Opposition at pp. 6 and 7:

> "The question of loyalty was injected into the case by petitioner himself, and only because the questions he refused to answer concerned his former subversive associations."

Examples could be multiplied but it is really pointless to argue whether this should be called a "loyalty" case or an "incompetency" case.

B. The Discharge Carries the Stigma of Disloyalty.

The indisputable fact is that the petitioner was discharged for his refusal to answer a question about his loyalty. Such a discharge, we submit, is a discharge which marks the employee with a badge of infamy (*Joint Anti-Fascist Refuge Committee v. McGrath*, 341 U. S. 123) and is a penalty within the meaning of the *Wieman* and

42. The Court asks rhetorically "Can it be seriously argued that where the superintendent of schools has trustworthy information indicating that a teacher . . . may entertain Communistic ideologies which could be transmitted to the youth in his care, that no inquiry can be made as to the fact and that the teacher is not required to respond?" (Ibid. p. 90). In the companion case of *Kaplan v. School District*, the true basis of the Court's decision is even less concealed. Cf. 388 Pa. (Adv.) 213, 224:

> "Could the Superintendent of Schools, with the responsibility he owes the school children and their parents, permit on his teaching staff a member of the Communist Party, or, what amounts to the same thing (where school children are in the picture) a person who refused to deny Communist Party activity with which he stood accused?"

Slochower cases, *supra*. (Cf. *Lovett v. United States*, 328 U. S. 303). Such a dismissal without a hearing on the loyalty question is a violation of due process of law.

This teacher was as much dismissed because of suspected disloyalty as was the petitioner in *Wieman v. Updegraff*, *supra*, in which this Court held that dismissal for refusal to take the oath amounted to a dismissal because of disloyalty or, at least under a stigma of disloyalty.[43]

C. The Wieman and Slochower Decisions Are Indistinguishable.

In an attempt to distinguish the *Wieman* and *Slochower* decisions, the respondent suggests that petitioner had a hearing, whereas those teachers did not. Respondent argues that petitioner had a full hearing on the charge of incompetency. Indeed, he did. But when the only issue in the hearing is whether a question was asked which he refused to answer, then the Board's description of petitioner's hearing is indeed apt; for in its Brief in Opposition at p. 4, respondent says that the Board "conducted a formal hearing. . . ." This is precisely what it was—a formality employed for the purpose of arriving at a foregone conclusion. As one Board member summed it up in comment-

43. The reality of the stigma is best shown in the following poignant comment in the Brief Amicus Curiae of the American Civil Liberties Union, Greater Phila. Br. in the Court below:

> "The reasoning behind this and similar rulings (sustaining respondent's objection to the question whether the Superintendent possessed any evidence reflecting on the loyalty of a teacher) was that loyalty was not an issue; this, while newspaper headlines screamed *School Board Suspends Teacher as Subversive* and *Hoyer Hands Charges to 26 Teachers Today in Drive on School Reds* and *School Union Head Fired in Red Quiz*, and while the Superintendent of Schools, the Board's only witness, was then accepting from the United Business Men's Association of Philadelphia its 48th Achievement Award for his *"courageous and forthright manner in handling subversives in our school system."* (Emphasis supplied.)

ing on an objection of petitioner's counsel to the question of a Board member,

> "They can yell, but it doesn't get them any place." (R. 65)

Respondent characterizes the gist of this Court's decision in *Slochower* as being that Slochower had no "opportunity to explain"; whereas petitioner did. This suggestion is unfair in view of the fact that, of the twenty-five companion cases, a number of the teachers did explain, both to the Superintendent and to the Board, and fully answered the questions about their associations. They were nevertheless discharged on the same ground as petitioner.

Under the charges as drawn, what "explanation" is open? Loyalty is ruled out; inferences of disloyalty are expressly disclaimed, and competency under the statutory rating system is conceded (R. 53, 54).

Petitioner did explain to the Superintendent his reason for not answering the question. He told the Superintendent he was doing so on advice of counsel and he also told the Superintendent, almost in the words of the statute[44] the legal basis for counsel's advice (R. 19, 20).

The only meaning left to respondent's so-called explanation is capitulation—to tell all about one's self and others, entirely to satisfy the curiosity of the Superintendent and the Board on any matter they deem pertinent to one's fitness to teach. Tenure, academic freedom, the rights to freedom of opinion and political association, have thus passed the vanishing point on the vehicle of "explanation". It is clear that explanation, even in the sense of concession, would not and did not fit the demands of the Board of Education. It is equally clear that no explanation of the reason for refusing to answer did, in this case or any other, prevent dismissal. The attempted distinction

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44. Cf. Footnote 14, *supra*, p. 16.

of *Wieman* and *Slochower* rests, therefore, on a factual fantasy.

It also rests upon a legal delusion, for if those decisions mean anything, they mean that the hearing, or the opportunity to explain must be upon the issue of loyalty if the dismissal is to carry with it the stigma of disloyalty. It would have done Slochower little good to have a hearing before the Board of Higher Education on a charge that he pleaded the Fifth Amendment, for the purpose of giving him an opportunity to explain why he did so. We do not believe that this Court intended so empty an adjudication in that case. Petitioner is entitled to the substance of due process, not merely its shadow.[45]

D. Petitioner Was Deprived of Substantial Rights Granted by the Loyalty Act.

Had petitioner really been given a hearing under the Pennsylvania Loyalty Act, which the Board so fastidiously avoided, he would have been entitled, in the first instance, to have no investigation begun except upon written complaint (Pennsylvania Loyalty Act, § 6, 65 Purdon's Pa. Stat. Ann. (Supp.) § 210). In addition, he would have been confidentially notified of the charge (§ 6) and the entire proceedings would have been private, unless and until he was discharged (§ 6). He would have had the right to a hearing on the issue of his loyalty (loyalty at the time of the hearing, not in the distant past). He would have had an opportunity to reply to charges specifically drafted (§ 7). He would have had the right to require the Board to prove its case by legally competent evidence (§ 11). He would have had the right to compulsory process (§ 11), to cross-examination and all of the rules of evidence and procedure prevailing in the courts (§ 11). Furthermore, he could require that the proof of subversion appear by a fair preponderance of the evidence (§ 7). In addition, he would

45. *Cole v. Arkansas*, 333 U. S. 196.

have been accorded judicial review, including a hearing de novo in the Court of Common Pleas (§ 12) with the right of appeal to the Supreme Court of Pennsylvania. The difference between this and the procedure adopted by the Board need not be labored.

Since the dismissal carried a real taint of disloyalty and since petitioner was accorded no opportunity to be heard as to his loyalty, the dismissal denied him due process of law.

CONCLUSION.

For the foregoing reasons, petitioner respectfully submits that the judgment of the Supreme Court of Pennsylvania should be reversed and petitioner reinstated in his position.

Respectfully submitted,

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August 20, 1957.

APPENDIX A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment—Due Process Clause.

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U. S. C. Const. Amdt. 14.

Acts of Assembly to Be Strictly Pursued.

In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect. 1806, March 21, P. L. 558, 4 Sm. L. 326, § 13. 46 Purdon's Pa. Stats. Ann. § 156.

Causes for Termination of Contract.

The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe: Provided, That boards of school directors may terminate the service of any professional employe who has attained to the age of sixty-two.

Nothing within the foregoing enumeration of causes, shall be interpreted to conflict with the retirement of pro-

fessional employes upon proper evidence of disability, or the election by professional employes to retire during the period of voluntary retirement, or the authority of the board of school directors to require professional employes to retire during said period of voluntary retirement, or the compulsion on the part of professional employes to retire at the attainment of age seventy. 1949, March 10, P. L. 30, art. XI, § 1122; 1949, May 9, P. L. 939, § 4. 24 Purdon's Pa. Stats. Ann. § 11-1122.

Rating System.

In determining whether a professional employe shall be dismissed for incompetency, the professional employe shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction, in accordance with standards and regulations for such scoring as defined by rating cards to be prepared by the Department of Public Instruction, and to be revised, from time to time, by the Department of Public Instruction with the cooperation and advice of a committee appointed by the Superintendent of Public Instruction, including representation from county and district superintendents of schools, classroom teachers, school directors, school supervisors, and such other groups or interests as the Superintendent of Public Instruction may deem appropriate. 1949, March 10, P. L. 30, art. XI, § 1123. 24 Purdon's Pa. Stats. Ann. § 11-1123.

Ineligibility for Employment or Appointment to Office.

No subversive person, as defined in this act, nor any person as to whom on all the evidence there is reasonable doubt concerning his loyalty to the government of the United States or the Commonwealth of Pennsylvania, shall be eligible for employment in or appointment to any office or any position of trust or profit in the government of

or in the administration of the business of this Commonwealth, or of any school district, county, municipality or other political subdivision of this Commonwealth. 1951, Dec. 22, P. L. 1726, § 3. 65 Purdon's Pa. Stats. Ann. § 213.

Present Employes; Oath; Discharge.

The appointment authority of each person, including teachers and other employes of the public school system who, on the first day of March, one thousand nine hundred fifty-two, shall be in the employ of the Commonwealth of Pennsylvania or of any of its political subdivisions, other than those holding State or local elective offices of any kind; shall require such person to, and every such person shall, on or before the first day of April, one thousand nine hundred fifty-two, make a written statement, under oath or affirmation, which statement shall contain notice that it is subject to the penalties of perjury, and shall be in the following form:

"I, ..., do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth, and that I will discharge the duties of ..... with fidelity.

"And I do further swear (or affirm) that I do not advocate, nor am I knowingly a member of any organization that advocates, the overthrow of the government of the United States or of this Commonwealth by force or violence or other unconstitutional means, or seeking by force or violence to deny other persons their rights under the Constitution of the United States or of this Commonwealth.

"And I do further swear (or affirm) that I will not so advocate nor will I knowingly become a member of such organization during the period that I am an

employe of the Commonwealth of Pennsylvania (or political subdivision thereof)."

Any persons failing or refusing to execute either statement required hereby shall be discharged immediately by the proper appointing authority." 1951, Dec. 22, P. L. 1726, § 5. 65 Purdon's Pa. Stats. Ann. § 215.

Investigations.

Any appointing authority may at any time, upon written complaint, investigate any person, including teachers and other employes of the public school system, appointed or employed by him, to determine whether he is a subversive person. If, upon any investigation, it appears that such person is a subversive person, the person shall immediately be privately and confidentially notified of the recommendation by the appointing authority. No public announcement, release, statement or comment concerning the investigation, recommendation or notification shall be made by the appointing authority in any way whatsoever, unless and until the person so notified is discharged under section seven of this act. 1951, Dec. 22, P. L. 1726, § 6. 65 Purdon's Pa. Stats. Ann. § 216.

Hearing Before Appointing Authority.

Any person, including teachers and other employes of the public school system, who has been so notified under this act, shall have a right to a hearing before the proper appointing authority within thirty (30) days after receiving said notification. If no hearing is requested within thirty (30) days after said notification is received, the person shall immediately be discharged by the appointing authority. He may appear before such appointing authority personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf through witnesses. The person who has been so

notified shall at the same time be further informed in writing of such hearing, at least ten days before the day set for the hearing, and shall be informed therein of the nature of the charges against him; and the person who has been so notified shall be informed in the notice (1) of his right to reply to such charges in writing within ten days after the date of service, (2) of his right to a hearing on such charges before the appointing authority, which hearing may be private and confidential or may be public, at the option of the person so notified, and (3) of his right to appear before such appointing authority personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his own behalf through witnesses. If, after due hearing, it is determined by the appointing authority by a fair preponderance of the evidence that the person who has been so notified is a subversive person, as defined in this act, the person who has been so notified shall be discharged; otherwise, the recommendation shall be ignored. Said determination shall be made within sixty (60) days after the hearing. If the appointing authority shall be comprised of three or more members, a vote of two-thirds of the members shall be necessary in order to discharge a person. 1951, Dec. 22, P. L. 1726, § 7. 65 Purdon's Pa. Stats. Ann. § 217.

Appeals to the Superintendent of Public Instruction.

After a final determination of discharge under this act by an appointing authority, any teacher or other person employed in the public school system of the Commonwealth who believes himself aggrieved by such determination may appeal on the record from the determination by an application in writing to the Superintendent of Public Instruction of the Commonwealth within twenty days after receiving written notice of such determination. The superintendent shall set a time and place for the hearing of the appeal, which hearing shall be not more than thirty (30)

days after receipt thereof, and give due notice of said hearing to the appellant and to the appointing authority whose determination is under review. The hearing shall be held by the superintendent or by a person or persons, not exceeding three, designated by the superintendent in writing to hear the appeal in his behalf. The superintendent, in his discretion, may designate such person or persons to hear such appeal and to report to him. The persons so designated by the superintendent may be officers or employes of the civil service of the Commonwealth. The person or persons holding the hearing may make such inquiry as may be deemed advisable. Within sixty (60) days after the hearing on appeal, the superintendent shall affirm or reverse the findings and determination under review, and, in the case of reversal, shall order the reinstatement of the appellant, who shall be entitled to back pay from the date of his discharge. 1951, Dec. 22, P. L. 1726, § 10. 65 Purdon's Pa. Stats. Ann. § 220.

Effect and Applicability of Act.

(a) The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law. No procedure provided by any existing tenure or civil service law shall be applicable in any proceeding under this act. 1951, Dec. 22, P. L. 1726 § 15(a). 65 Purdon's Pa. Stats. Ann. § 225(a).